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Nos. 91-261, 91-274

# In the Supreme Court of the United States

October Term, 1991

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THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., ET AL.
Petitioners,

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.
Respondents.

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PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, MASSACHUSETTS, MINNESOTA, NEW JERSEY, PENNSYLVANIA, WYOMING, AND THE COMMONWEALTH OF NORTHERN MARIANA ISLANDS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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## ISSUE PRESENTED

Does the National Labor Relations Act clearly express an intent to preempt states and their subdivisions from determining labor relations policy on their own public works projects in the manner that Congress expressly authorized for the private construction industry?

## TABLE OF CONTENTS


| | Page |
|---|---|
| ISSUE PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF INTEREST OF AMICI CURIAE | 1 |
| ARGUMENT | 4 |
| 1. The Court Should Grant Certiorari In Order To Correct The Imbalance Between State And Federal Authority Created by The Majority Opinion Below. | 5 |
| 2. The Court Should Grant Certiorari Because The Courts Of Appeals Are Misreading This Court's Decisions In A Way That Injures Federalist Principles. | 14 |
| 3. The Court Should Grant Certiorari Now, Because The States Are Being Deprived Of Their Sovereign Authority On Current Projects. | 18 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES


| Case | Page |
|---|---|
| Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977) | 12, 16 |
| Atkin v. Kansas, 191 U.S. 207 | 8 |
| Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) | 12 |
| Glenwood Bridge, Inc. v. City of Minneapolis, 1991 U.S. App. Lexis 17422 (8th Cir. 1991) | 17 |
| Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1985) | 15 |
| Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) | 5, 11 |
| Heim v. McCall, 239 U.S. 175 91915) | 8 |
| Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) | 7 |
| New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) | 16 |
| Port Authority Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868 (1990) | 18 |

TABLE OF AUTHORITIES - Continued


| | Page |
|---|---|
| Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) (emphasis added) | 12 |
| Reeves, Inc. v. Stake, 447 U.S. 429 (1980) | 7, 8, 10 |
| San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) | 13 |
| South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) | 7 |
| United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) | 7 |
| White Construction Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) | 7, 10 |
| Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1978) | passim |
| **Statutes** | |
| 29 U.S.C. § 151 et seq. | passim |

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## STATEMENT OF INTEREST OF AMICI CURIAE

The states identified above submit this brief amici curiae to urge the Court to grant certiorari. This brief emphasizes the federalism concerns inherent in the public construction and procurement contexts. The amici argue that State and local agencies maintain

flexibility over labor agreements on their own public works projects, and that the National Labor Relations Act ("NLRA") does not preempt local control.

The amici are sovereign states that possess the authority over public works projects within their jurisdictions. In addition to the project labor areements cited in the Trade Council's petition (No. 91-261), pp. 12-13, n.5 and in the MWRA's petition (No. 91-274), p. 12, the projects set forth in the margin have been completed under project labor agreements.[1/] The reasoning of the

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1/ In the Minneapolis-St. Paul metropolitan area, there have been dozens of recent public works projects that have been completed under project labor agreements, including the following: the Hubert H. Humphrey Metrodome, the new University of Minnesota Hospital, the Minneapolis

(footnote continued)

majority opinion below alters the balance of state and federal control over such public works projects.

In particular, the amici view this case as an important test of their control over labor relations on state and local public works projects. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the states and the Federal Government and provide guidance to states who wish to exercise their powers in accordance with principles of federalism.

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(footnote continued)

Waste-to-Energy Plant, the Minneapolis Convention Center, the Nicollet Mall Project, the Hennepin County Government Center, the St. Paul Civic Center, the Ramsey County Courthouse renovation, and the Seneca, Blue Lake and Empire waste-water treatment facilities.

The interest of the amici transcends any dispute over the particular content of the project labor agreement in this case. The amici seek to preserve the constitutional balance between the powers of the Federal Government and those of the states, as established by the framers of the Constitution. They seek to preserve the states' autonomy and their identities as independent repositories of sovereign authority within our federal system.

## ARGUMENT

The majority opinion below reads into the National Labor Relations Act implied restrictions on labor relations on state and local government public works projects that do not apply to private projects. Congress has not expressed these restrictions expressly or even by necessary implication. On

the contrary, the NLRA authorizes the state action in question.

By finding preemption so readily here, the Court of Appeals holding violates the basic tenets of federalism that underlie our constitution. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991).

1. The Court Should Grant Certiorari In Order To Correct The Imbalance Between State and Federal Authority Created By the Majority Opinion Below.

The holding of the majority below wrests control over public construction projects from the states and their subdivisions. As a result, states, public authorities and municipalities have lost flexibility over labor relations on their public works projects. This intrudes into the states' "substantial sovereign authority", thereby depriving the people of the benefits of decentralized

government that underlie the structure of our government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id., 111 S.Ct. at 2399.

The principles of federalism apply with full force to a state authority's proprietary interests on its own public works project. In this case, all of the interests at stake implicate the right of the people and their local representatives to control local public works projects and to choose labor policy that will best serve the public

interest.[2/]

In Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980), the Court found "no indication of a constitutional plan to limit the ability of the States

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2/ Most discussion regarding the states as proprietors, or as participants in the market, has occurred in the context of the dormant Commerce Clause. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). Cf. United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) (privileges and immunities clause). It is true that these cases do not address the question of what the States may do, given enactment of the National Labor Relations Act. Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1978). Here, however, the NLRA does not withdraw state authority grounded in legitimate proprietary interests. Moreover, identifying the scope and purposes of the market participant doctrine sheds considerable light on what interests the MWRA may assert, as owner of the jobsite and as purchaser of construction labor for its own project.

themselves to operate freely in the free market", and noted that "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."

Reeves' articulation of the states' "role . . .'" as guardian and trustee for its people"'", 447 U.S. at 438, is instructive here.[3/] The MWRA's

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3/ Reeves was quoting Heim v. McCall, 239 U.S. 175 (1915). In fact, the full quotation from Heim is even more pertinent:

> Atkin v. Kansas, 191 U.S. 207, 222, 223 . . . declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of municipalities."

Heim, supra, 239 U.S. at 191.

interests bear directly upon the efficient, expeditious and effective completion of the MWRA's sewerage treatment facilities themselves. The MWRA's duty to avoid the costs of delay, in the form of increased construction costs, potential fines, and environmental harm, falls squarely within its duty to its ratepayers and to the voters to manage its property and purchasing policies so as to achieve the greatest benefit from the Harbor cleanup project at the least cost. It would be a breach of that public trust to subject the MWRA's ratepayers to the costs and risks of delay.

The MWRA's requirement regarding Bid Specification 13.1 is limited to the "discrete, identifiable class of economic activity in which [it] is a

major participant." White, supra, 460 U.S. at 211, n.7. Without a compelling congressional direction, the Courts should not conclude that the otherwise lawful project labor agreement became unlawful because of the MWRA's involvement, which in turn arose only because of its strong proprietary interest in timely and cost-effective completion of its sewerage treatment facilities.

The MWRA, acting as proprietor of the construction site and of the sewerage facilities, should "share existing freedoms from federal constraints", Reeves, supra, 447 U.S. at 439, that are available to private parties under the NLRA. Even the majority below conceded that "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor

contract". See A. 24a.[4/] If MWRA is to share existing freedoms from federal constraints, then it must be allowed to choose clauses that were explicitly authorized for private employers under sections 8(e) and 8(f) of the NLRA.

While Congress, acting under its constitutionally conferred powers, "may impose its will on the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." Gregory, supra, 111 S.Ct. at 2400.

The majority opinion below subverts this constitutional scheme by departing from the rule that "'a clear and manifest purpose' of preemption is

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4/ For convenience, the amici cite to the appendix of the MWRA's petition.

always required." Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added). See also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated ouster of [a state statute] . . . in the absence of an unambiguous congressional mandate to that effect.") (emphasis added).

These considerations apply with full force to the NLRA challenge on the present facts. "The National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." Abood v. Detroit Bd. of Education, 431 U.S. 209, 223 (1977). The exemption of the states from the definition of employer is strong evidence of congressional intent

in this regard. 29 U.S.C. § 152(2).

There are "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); See also Gould, supra, 475 U.S. at 291 ("legitimate response to State procurement constraints or to local economic needs"). The cases demonstrate that the interests at stake here fall within this exception.

Nothing expressed or implied in the NLRA comes close to the type of Congressional statement that warrants preemption. 29 U.S.C. § 152(2) strongly supports the conclusion that preemption was not intended in the circumstances

alleged by ABC. A private employer in the construction industry has the benefit of Sections 8(e) and 8(f). A state using its own employees would be exempt from the NLRA under Section 2(2). It strains basic principles of federalism and logic to conclude that, without saying so, Congress intended to preempt the Agreement merely because a governmental party is involved.

2. The Court Should Grant Certiorari Because the Courts Of Appeals Are Misreading This Court's Decisions In A Way That Injures Federalist Principles.

In order to place greater burdens upon governmental employers and developers than upon private companies, the majority below relied on Gould, supra. Gould did not establish the broad, judge-made preemption that the Court below seems to apply. The decision below demonstrates the need for

this Court to define the limits of its decision in Gould.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, n.8 (1985). Instead of using its procurement role to effect a regulatory purpose, here, MWRA is using that role to achieve procurement goals, which fall within the exceptions to Gould.

In the first place, Congress intended to allow the state to affect labor relations on state public works projects funded by state agencies on

state land. See U.S.C. § 152(2);[5/] Abood, supra, 431 U.S. at 223; New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-545 (1979).

Second, the District Court's findings regarding the origin of the labor provisions (App. 74a-76a) establish at least four important proprietary interests of the MWRA and the Commonwealth: (1) the need for labor peace and stability on the jobsite of a public works project owned by the MWRA, (2) avoiding the risk of substantial fines against the MWRA for non-compliance with the court-ordered

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5/ The Act provides that:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . 29 U.S.C. § 152(2) (emphasis added).

construction schedule, (3) increased costs to the MWRA in the event of delays caused by labor disputes, and (4) abating pollution of waters of the Commonwealth, namely the Boston Harbor. As the District Court found, events in the early stages of construction already had proven the need for labor peace and the potential for disruption of the project in the event of labor disputes. (App. 74a-75a).

The First Circuit's misapprehension of Gould has been echoed by a divided panel of the Eighth Circuit. See Glenwood Bridge, Inc. v. City of Minneapolis, 1991 U.S. App. Lexis 17422 (8th Cir. 1991). It is apparent that only a decision by this Court can establish the proper limits on the Gould doctrine.

3. The Court Should Grant Certiorari Now, Because The States Are Being Deprived of Their Sovereign Authority On Current Projects.

The injury to our federalist system effected by the First and Eighth Circuits has immediate and concrete consequences, which necessitate granting certiorari now. States and localities are losing their ability to safeguard their public trust on projects that are well underway, such as the Boston Harbor project. This injury cannot be remedied except by a decision from this Court. The "States are unable directly to remedy a judicial misapprehension of" Congressional intent regarding the federal-state balance. See Port Authority Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868, 1872 (1990) (discussing the Eleventh Amendment).

Unless the Court grants certiorari, the states and their subdivisions will be unable to respond effectively to the special conditions in the construction industry -- the very same conditions that led Congress to authorize project labor agreements on private construction projects:

> the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry . . .

App. 39a (Dissenting opinion of Breyer, C.J.), citing S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959).

The Boston Harbor Project, like many others across the nation, will not wait. Unless certiorari is granted now, many current public projects will be at a disadvantage compared to private

projects. States and their subdivisions will be unable to serve their public trust in the most effective fashion. Only a decision by this Court can return the authority over public projects where it belongs: in the hands of the public officials whose duty it is to serve the public and to carry out the wishes of the people's elected representatives.

## CONCLUSION

This Court should grant the petitions for certiorari in Nos. 91-261 and 91-274.

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## DESCRIPTION OF INTEREST OF AMICI CURIAE

Both *Amici*, the National Constructors Association ("NCA") and Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc. ("Bechtel/Parsons") support the position of petitioners in these proceedings and submit that the decision of the U.S. Court of Appeals for the First Circuit in *Associated Builders v. Mass. Water Resources Auth.*, 955 F.2d 345 (1st Cir. 1991) should be reversed.

The NCA is a not-for-profit organization comprised of the nation's largest unionized construction companies.[1] NCA members continuously work on major construction projects across the country involving many billions of dollars. Along with constructing the nation's largest private sector projects, NCA members also regularly perform work on the nation's largest public construction projects sponsored by federal, state, and municipal authorities.

NCA member companies are all "employers engaged primarily in the building and construction industry" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "NLRA"). As such, Congress has given NCA members important rights under Section 8(e) and (f) of the NLRA. *See* 29 U.S.C. §§ 158(e) and (f). NCA members regularly rely on these statutory rights in negotiating project labor agreements that require all contractors performing work on a single construction project to become bound by a single project agreement. These rights—as they apply to publicly-owned projects—have been effectively repealed by the decision below.

[1]NCA members include ABB-CE Services, Inc., ABB Lummus Construction Company, The Austin Company, Badger America Inc., Bechtel Construction Company, Oscar J. Boldt Construction Company, Ebasco Constructors, Inc., Fluor Constructors International Inc., Kiewit Industrial Co., Leonard Construction Company, Parsons Constructors, Inc., The Rust Engineering Company, Stone & Webster Engineering Corporation, UE&C Catalytic, Inc. and Wright Schuchart Harbor Co.

Bechtel/Parsons is a joint venture and is the Construction Manager retained by the Massachusetts Department of Public Works (the "MDPW") to manage its Central Artery/Third Harbor Tunnel Project (the "Artery Project"). The Artery Project is one of the largest and most complicated construction projects ever undertaken in this country. Its estimated cost will exceed four billion dollars and it will take approximately eight or more years to complete. The Artery Project will include major improvements and expansion of two interconnecting Interstate highway systems (I-90 and I-91); construction of an eight-to-ten lane underground expressway through downtown Boston; and construction of a four lane tunnel under Boston Harbor connecting the Massachusetts Turnpike and the Logan Airport road system. That three-quarters of the construction will take place underground in densely populated, urban areas adds to the complexity of this Project. So, too, does the fact that this construction must occur in and around existing mass transit systems that, due to existing congestion, cannot be taken out of service for any extended period of time during construction.

As Construction Manager of the Artery Project, Bechtel/Parsons serves in a role identical to that of petitioner Kaiser Engineers, Inc. ("Kaiser") on the Boston Harbor Project (the "Harbor Project"). Like Kaiser, Bechtel/Parsons conducted an analysis of the most cost-effective and efficient way to proceed with this project of unprecedented size and complexity. To ensure uniformity of work rules and to protect the project from strikes, picketing, and other disruptive and delaying effects of lawful labor disputes, Bechtel/Parsons (like Kaiser) negotiated a special labor stabilization, or project, agreement to cover all construction on the Artery Project site ("Artery Project Labor Agreement"). Similar to Kaiser's Harbor Project Labor Agreement, the Artery Project Labor Agreement requires that all contractors on the Project become bound by the agree-

ment,[2] recognize the signatory unions and utilize hiring halls. The MDPW, sponsor of the Artery Project, repeated this requirement in its bid specifications, just as the Massachusetts Water Resources Authority ("MWRA") repeated a similar requirement from Kaiser's Project Labor Agreement in its Bid Specification 13.1. Thus, the enforceability of both this core term of Bechtel/Parsons' Project Agreement and the implementing state bid specification are inextricably tied to the validity of the Harbor Project specification and the outcome of this proceeding.

The importance of project agreements to construction managers such as Bechtel/Parsons and other NCA members acting in that capacity cannot be over-emphasized. By requiring all contractors to be bound by a single labor contract, a project agreement ensures that various work rules and conditions on a single project site (for example, shift schedules, break times, travel times, holidays, etc.) are standardized, thereby eliminating the numerous conflicting practices of individual contractors (whether union or non-union) that otherwise would be in effect. Working around each contractor's own work rules would be next to impossible in the absence of this standardization. In addition, project agreements typically contain a binding grievance/arbitration procedure designed to resolve all work and jurisdictional disputes that inevitably occur when thousands of employees, employed by scores of different employers and represented by dozens of different unions, work side-by-side on the same construction project. The full advantage of these benefits can be secured only by requiring that all site contractors become subject to a single, master project labor agreement.

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[2]As a project agreement, this contract only applies to work performed on this particular project. Thus a contractor who becomes bound by this agreement need not recognize the union nor comply with the terms of the agreement at any other worksite.

But most importantly, project labor agreements—like the Harbor and Artery agreements—provide comprehensive no-strike protection, for the entire life of the project, against the costly delays and disruptions caused by lawful strikes and picketing. These agreements insulate the work of the project from strikes called by signatory unions against signatory contractors, regardless of whether the strike is related to the project. Consequently, regardless of labor strife in the world around the project, the project itself remains a strike-free zone. To appreciate the significance of this no-strike pledge on the Harbor and Artery Projects, the Court need only consider that there are approximately two dozen different building trade unions in the Boston area. Each union typically is party to a two- or three-year agreement with contractors working within its trade and geographic jurisdiction. Because approximately 75% of all major construction in the Boston area typically is performed by union contractors, the majority of contractors on the Harbor or Artery Projects would be party to one of these 24 agreements even in the absence of this requirement in the Project Labor Agreements. *Utility Contractors Ass'n of New England, Inc. v. The Comm'rs of The MDPW*, No. 90-3035, slip. op. at 1-2 (Mass. Super. Ct. August 2, 1990). With as many as 24 different contracts expiring every two or three years over the anticipated eight-year duration of the project, there could be between 50 and 100 separate negotiations for new collective bargaining agreements occurring among the contractor workforce. *Id.* Any one of these negotiations could result in a lawful strike seriously delaying the completion of either the Artery or Harbor Projects.

A comprehensive no-strike clause, like those contained in the Harbor and Artery Project Labor Agreements, protects against this possibility by preventing these strikes from impacting the project site. Of course, just as the proverbial chain is only as strong as its weakest link, a construction project's protection

from lawful strikes is only as strong as the coverage of this no-strike clause is broad. Even a single union engaged in a lawful strike against a single contractor on a construction project is often capable of bringing the entire project to a standstill. Meaningful no-strike protection for a project can only be secured by ensuring that the no-strike clause extends to *all* project contractors; this, in turn, can be accomplished only by requiring that all contractors on the site become bound by a project labor agreement.

The decision below prevents Kaiser (as well as the Commonwealth of Massachusetts) from reaping these benefits of its Project Labor Agreement because it prevents enforcement of the requirement that all contractors on the Project become bound by the Agreement. Although the court literally found that the Kaiser Agreement, including this specific requirement, was "lawful," it held that the Commonwealth's effort at enforcing this requirement by repeating it in Bid Specification 13.1 was unlawful. Yet, without this Bid Specification, there is no mechanism for implementing Kaiser's contract.

If the First Circuit's decision is left undisturbed, Bechtel/Parsons' Project Agreement on the Artery Project will be impacted similarly, as will the right of all NCA members to use Section 8(e) and 8(f) labor agreements on future public construction projects. The potential impact of this decision is extremely significant. In 1990, publicly-owned projects accounted for approximately 25% of all new construction in this country, with an aggregate value in excess of $109 billion. U.S. Department of Commerce, International Trade Administration, *Construction Review, A Bimonthly Industry Report*, at pp. 1 and 7 (March/April 1991). As America's infrastructure undergoes essential reconstruction in the coming years, public projects will take on even greater importance. And, project

labor agreements designed to ensure labor stability and timely project completion will have an even greater value.

Prehire project agreements that require all contractors to become bound by their terms are a way of life in the construction industry. The Court has already been provided an impressive, albeit incomplete, listing of public construction projects on which project agreements, like the one in issue here, have been used. *See* Brief of the Building and Construction Trades Council of the Metropolitan District in Support of Its Petition for a Writ of Certiorari at 12-13, n.5. These agreements are used for three basic reasons:

> (1) they promote cost effective, efficient and timely completion of construction projects;
>
> (2) they offer the only means for protecting a project from strikes; and
>
> (3) they have always been considered by both employers and unions to be as lawful and fully enforceable on public projects as on private construction sites.

As the states are confronted with the enormous task of rebuilding our nation's roads and bridges, it is critical that their projects not be denied the benefits and protections of Section 8(e) and (f) that are available on all privately owned construction sites.

## SUMMARY OF ARGUMENT

In a misapplication of federal preemption principles, the First Circuit invalidated Massachusetts Bid Specification 13.1 because, in that court's view, the Specification constituted a

"pervasive intrusion" by the Commonwealth into the collective bargaining process of project contractors. 935 F.2d at 353.[3] Bid Specification 13.1, however, merely repeated a lawful contractual provision, earlier negotiated between Kaiser and the Building and Construction Trades Council of the Metropolitan District (the "Union"), which required all project contractors to become bound by the Project Labor Agreement. While this *contractual* requirement did "intrude" into the collective bargaining process of other contractors, it did so in a manner contemplated—and, indeed, expressly authorized—by Congress under Section 8(e) and (f) of the NLRA. The Commonwealth's repetition of this requirement in Bid Specification 13.1 represents no additional intrusion into the bargaining process and, therefore, should not be preempted.

Moreover, the First Circuit's conclusion defeats the very objective of federal preemption. This decision empowers individual states to establish statutory schemes that effectively preclude private contractors on public projects from utilizing rights granted them under Section 8(e) and (f). In so doing, the court's decision not only permits truly pervasive intrusion into the bargaining process by the states, but it also denies the primary goal of federal labor law preemption; namely, ensuring the uniform application of federal labor laws. To avoid this result, the decision below must be either reversed or—at the other extreme—carried one step further so as to invalidate those provisions of the Massachusetts Bidding Law that

[3]There are two principal preemption analyses applicable in labor cases. Under this Court's ruling in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), states are prohibited from regulating conduct arguably protected by Section 7 or prohibited by Section 8 of the NLRA. States are also prohibited from regulating those activities which Congress intended to be left unregulated under the Court's holding in *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976). It is this latter *Machinists* doctrine that is implicated in this case.

required the Commonwealth to issue Bid Specification 13.1 initially.

## ARGUMENT

### POINT I

### CONTRARY TO THE GOAL OF THE PREEMPTION DOCTRINE, THE DECISION BELOW ACTUALLY PROMOTES STATE INTERFERENCE WITH FEDERALLY PROTECTED RIGHTS

The focus of both the court below and the parties to this case has been on a state's right to secure the indirect benefits of prehire agreements on publicly-owned projects. While the *Amici* agree with petitioners that states should not be deprived of this right, there are even more fundamental and explicit rights that are denied by the lower court decision—federal statutory rights accorded to private employers in the construction industry, such as Kaiser, Bechtel and other NCA members. These rights have been effectively repealed.

As explained below, the NLRA explicitly authorized Kaiser to enter into its Project Labor Agreement. In fact, the provision of the Agreement that respondents find most offensive—the requirement that all project contractors become bound by the Project Labor Agreement—is specifically sanctioned by the NLRA. Yet the First Circuit held that because peculiar state bidding laws required the Commonwealth to repeat this contractual provision in Bid Specification 13.1, Kaiser could not enforce its federally protected labor contract. Consequently, this decision does not protect federal labor law rights, but rather it permits state law, in the form of the Commonwealth's public bidding requirements, to eliminate federal labor law rights, a result antithetical to preemption principles.

### A. The Private Project Labor Agreement That Gave Rise to Bid Specification 13.1 Is Explicitly Authorized by the NLRA

Recognizing the unique needs of the construction industry, Congress amended the NLRA in 1959 to add Section 8(f) and modify Section 8(e). Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into collective bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, before the first employee is even hired for a project. *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978); *Local 100, United Ass'n of Journeyman and Apprentices v. Borden*, 373 U.S. 690 (1963).

These labor agreements, known as "prehire" agreements, were sanctioned under Section 8(f) to protect the organizational and representational interests of construction unions and employees. Congress determined that construction industry employees could not rely effectively on traditional representational petitions and elections to unionize due to the temporary and sporadic nature of their employment. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 55-56 (1959), *reprinted in* 1 *NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959* at 451-52 ("Leg. Hist."); *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom., Int'l Ass'n of Bridge Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988). By permitting prehire agreements, Congress intended to expand organizational and representational opportunities for construction employees.

Section 8(f) also was enacted to accommodate the unique needs of construction industry employers. Congress considered prehire agreements critical to the industry because contractors needed to know their labor costs in advance of bidding

on a project and they needed to be assured of access to a ready supply of skilled craftsmen (through the hiring hall) if they were awarded the job. H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), *reprinted in* 1 Leg. Hist. 777. Congress concluded that the most appropriate way to achieve these objectives was to permit employers to enter into binding contracts in advance of actually securing work and, therefore, in advance of actually hiring employees.

Congress' accommodations to employees, unions and employers in the construction industry went beyond merely authorizing the prehire agreements. The 1959 amendment to Section 8(e) permits a general contractor's prehire agreement to lawfully require all other contractors performing work on that particular project site to become bound by the terms of that labor agreement. *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 657 (1982); *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 633 (1975). This practice was an essential part of the existing "pattern of collective bargaining" in the construction industry prior to 1959, and Congress intended to legitimize and preserve this practice through the construction industry provision of Section 8(e). *Woelke & Romero Framing*, 456 U.S. at 657. Congress permitted these "union signatory" clauses specifically to promote labor harmony and "to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site." *Connell*, 421 U.S. at 630 (*quoting Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966)).

The legislative history of Section 8(e) and (f) confirms that the same pattern of bargaining was found on public, as well as private, construction projects. In congressional hearings held in 1951 and 1959 to assess the need for accommodations to the construction industry, testimony described a bargaining pat-

tern for public works—the construction of dams, roadways and bridges—that was no different than that described for purely private projects. *See* Hearings on S.1973 Before the Subcommittee on Labor and Labor-Management Relations, 82d Cong., 1st. Sess. 27, 29, 31, 35, 39 and 45 ("1951 Hearings"); Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st. Sess. (1959) ("1959 Hearings"); *See also* U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects* 14 (1980) ("Among the first project agreements designed to meet [the industry's] problems were those adopted during the construction of a portion of the Grand Coulee Dam in the state of Washington in 1937-38 and the Shasta Dam in California in 1940."). On both private and public projects, contractors and unions relied on prehire agreements, including agreements with restrictive contracting provisions, to meet their needs. *See Woelke & Romero Framing*, 456 U.S. at 658-59, n.11. And nowhere in this congressional discussion of the construction industry were distinctions drawn between private and public construction projects.

Nor does logic support any difference in the treatment of private and public projects. A construction industry employer's need to estimate its costs, and secure a ready supply of labor, and promote harmonious relations on the project site, as well as the employees' and unions' representational and organizational interests—all objectives served by Section 8(e) and (f)—do not differ depending on the public or private nature of the project's owner. *See Associated Builders v. Mass. Water Resources Auth.*, 935 F.2d at 364 (Breyer, C.J., dissenting).

Congress clearly understood that prehire agreements, complete with contracting restrictions, were a vital part of the public construction fabric in 1959. Consequently, its failure to restrict Section 8(e) and (f) to privately-owned construction sites must reflect an intent to preserve these arrangements on both public and private projects because their importance is universal to all construction. *See id.*; *Cf. Woelke & Romero Framing*, 456 U.S. at 658-59.[4]

Thus the very provision considered by respondents and the court below to be beyond the reach of state enforcement is explicitly sanctioned by the NLRA. Indeed, the First Circuit itself acknowledged that the Project Labor Agreement, with its requirement that all contractors become bound by its terms, "is a valid labor contract." 935 F.2d at 356. However, in a *non-sequitur* of monumental proportions, it proceeded to declare that conclusion "irrelevant." *Id.* at 357.

### B. The Decision Below Incorrectly Applied Preemption Principles and Actually Grants States the Opportunity to Repeal Section 8(e) and (f) on Public Construction Sites

The First Circuit based its preemption conclusion on the fact that Bid Specification 13.1 repeated the Project Labor Agreement's lawful requirement that all site contractors must become bound by the Agreement. In the court's view, the imposition of this requirement by the Commonwealth constituted an impermissible intrusion into the collective bargaining

[4]The First Circuit's conclusion that this "deafening" silence must reflect an intent not to extend Section 8(e) and (f) rights to publicly-owned projects, *see* 935 F.2d at 357, fails to take into account the existing legislative scheme. As explained by Chief Judge Breyer in dissent, because the NLRA already excluded states from the scope of its coverage, there was no need to explicitly reference states in an exception to otherwise prohibited conduct under Section 8(e). *See* 935 F.2d at 364.

process of those contractors subject to Bid Specification 13.1. 935 F.2d at 353.

Significantly, on a privately owned project, this same requirement could be imposed without creating any issue of preemption because there would be no need for any state involvement. The contract between Kaiser and the Union, including the requirement that all site contractors become bound by the agreement, could be implemented simply by Kaiser's direct contracting authority, *i.e.*, its insistence that successful bidders for project work execute its project labor agreement if they wish to be awarded the work. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270 n.9 (1983). Even on those publicly-owned projects where the construction manager contracts *directly* with all major project contractors, and the municipal or state owner need not execute direct agreements with these contractors, the same project labor agreement requirement could be implemented by Kaiser's insistence that successful bidders comply with the project labor agreement. In both cases, there could be no question that the underlying project labor agreement, including the specific requirement that all other contractors on the site conform to the labor agreement would be lawful and enforcable under Section 8(e) and (f). *See id.*

In this case, the nature of the Harbor Project and the requirements of Massachusetts' bidding laws, required some Commonwealth involvement in the contract process. Specifically, state law compelled the Commonwealth to carry out the competitive bidding process itself and to directly contract with each entity performing major work on the site. *See* 935 F.2d at 364 (Breyer, C.J., dissenting) (citing Mass. Gen. L. Ch. 30, § 39M and Ch. 149 §§ 44A *et seq.*) Thus state law precluded the execution contracts from running directly between the successful bidder and the Project's Construction Manager, Kaiser.

Compliance with state law further required that the bid specifications issued by the Commonwealth recite the essential performance requirements for project contractors. This meant including in the specifications, among other things, the explicit requirement of Kaiser's Project Labor Agreement that all project contractors must become bound by that labor agreement. If this requirement were not included in the specifications, it could not be enforced on the Harbor Project.

1. *The Court Below Improperly Relied On The Form, Rather Than the Substance, of the State's Conduct*

A significant flaw in the lower court's analysis is that it improperly examined Bid Specification 13.1 in a vacuum. Having determined that the Kaiser labor agreement was valid but "irrelevant," the court thereafter ignored the existence of that agreement and focused on Bid Specification 13.1 as a stand-alone provision. Reading the specification literally, the court held that the

> state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be.

935 F.2d at 353.

The focal point of federal preemption is the *substance* of the contested state regulation. Consequently, courts frequently have refused to permit the *form* of state action to dictate the results of preemption analysis. *See, e.g., Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 n.5 (1986) ("*Golden State I*"). Yet that is precisely what the First Circuit

allowed to happen when it analyzed Bid Specification 13.1 apart from the Project Labor Agreement.

Taking Bid Specification 13.1 out of context, the lower court viewed it as a state-generated determination that project contractors must become bound by the Project Labor Agreement. In reality, the state did not independently mandate that a labor agreement be reached or with whom it be reached, nor did it dictate its contents. This so-called intrusion into the bargaining process of site contractors did not come from the state at all. It was Kaiser who substantively (and lawfully under Section 8(e) and (f)) mandated those things. The Commonwealth merely repeated Kaiser's contractual requirement in its Bid Specification. Had Kaiser's negotiated agreement contained different terms, then the state's Bid Specification would have reflected those different terms. The true extent of the state's "intrusion," then, consisted of no more than providing a mirror image of the agreement reached by two private parties—Kaiser and the Union—and did not affect any substantive aspect of the bargaining process, as is required to trigger *Machinists* preemption. *See Golden State I*, 475 U.S. at 616 (the *Machinists* doctrine precludes states from entering "into the substantive aspects of the bargaining process. . .")

Interestingly, in reaching its preemption conclusion the First Circuit took false comfort in this Court's observation that "states are therefore prohibited from imposing *additional* restrictions on economic weapons of self-help . . . unless such restrictions presumably were contemplated by Congress. . . ." 935 F.2d at 352 (*quoting Golden State I*, 475 U.S. at 614-15) (emphasis added). It is precisely because Bid Specification 13.1, as relevant here, is merely a matter of form, mirroring the privately negotiated restrictions of the labor contract, that the state has placed no *added* restrictions on anything.

2. *The Court Below Failed to Recognize That This So-Called "Intrusion," Regardless of Its Form, Is Permissible*

But even if Bid Specification 13.1 is considered a substantive intrusion by the state, it is not of a type prohibited by the preemption doctrine. Federal labor preemption exists, in part, to avoid state conflict with federal law. *See Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). A critical consideration then, is whether the contested state conduct "frustrate[s] effective implementation of the Act's processes." *Golden State I*, 475 U.S. at 615 (*quoting Machinists* 427 U.S. at 147-48). It is readily apparent that the state action here—the Commonwealth's inclusion of the requirements of the Kaiser Project Labor Agreement in its Bid Specification—in no way conflicts with, or frustrates, federal labor policy. To the contrary, the alleged "wrong" of requiring all project contractors to become bound by this agreement regardless of their own labor policies is completely consistent with explicit federal labor policy. *See Woelke & Romero Framing*, 456 U.S. at 655-58, 663; *Jim McNeff*, 461 U.S. at 266-72, 270 n.9 (1983). Section 8(e) was purposefully enacted to allow the curtailment of individual contractor choice as a means of achieving work-site harmony. "Implicit in the construction industry proviso" of Section 8(e) is recognition that this curtailment and the contractor's acceptance of a union agreement is the *quid pro quo* for securing project work. *See id.*

Consistent with this federal policy, a similar requirement has been upheld on both a federal project where the requirement appeared in a project agreement negotiated by an agent of the federal government, *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, Nos. 91-5527, 91-658, Slip Op., (6th Cir. 1992), and on a municipally owned project where the requirement had been added to the municipality's own preexisting collective bargaining agreement, *Associated Builders*

*and Contractors v. City of Seward*, No. 91-35511, Slip Op., (9th Cir. 1992). Thus, this requirement has been sustained when it has been contained in private project labor agreements for use on private projects and in public labor agreements for use on public projects. There is no sound reason to conclude, as the lower court did here, that when this same requirement is included in a private project labor agreement for use on a public project, as here, it is any less consistent with the NLRA[5]

By choosing to ignore the Project Labor Agreements' consistency with federal labor policy, the First Circuit created a *per se* rule of federal preemption: any and all state action that touches upon labor matters is preempted. This Court, however, has adopted a contrary rule that compels *Machinists* preemption only when the state has " '[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced.*' " *Golden State I*, 475 U.S. at 616 (*quoting Machinists*, 427 U.S. at 149) (emphasis added). Here, the state's conduct not only fails to impinge upon "substantive aspects of the bargaining process" (since it merely reflects the conduct of private contracting parties) but, in implementing Kaiser's Section 8(e) and (f) rights, it directly promotes the objectives Congress sought to achieve in enacting those statutory provisions.

A second, and related, purpose underlying the *Machinists* doctrine is to advance the congressional determination that some matters of labor policy are simply to be left unregulated, so that they may be controlled by "the free play of economic forces." *Id.* Bid Specification 13.1 does not, however, regulate any matter intended to be unregulated.

[5]Last year, the Eighth Circuit enjoined the City of Minneapolis from using a project agreement containing this type of requirement. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991). This split decision, which came on an appeal of a request for a preliminary injunction, relied heavily on the First Circuit's rationale in this case.

First, Bid Specification 13.1 does not "regulate" at all. This Specification does not even attempt to mandate issues of labor-management relations or collective bargaining in the state generally. It is, instead, a simple exercise of the state's *purchasing authority* as a private buyer of construction services. *See* 935 F.2d at 366 (Breyer, C.J., dissenting); *see also Associated Builders and Contractors v. City of Seward*, No. 91-35511, Slip Op. at 7. This Court has recognized in the analogous Commerce Clause context, "[w]hen the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise." *See id.* (*quoting United Building and Construction Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 220 (1984)) (emphasis in original).

Building upon this concept, and the rationale expressed in Judge Breyer's dissent in the instant proceeding, the Sixth Circuit recently recognized that federal preemption does *not* preclude a federal agency from enforcing a project labor agreement containing a union signatory clause on one of its public construction projects. That court concluded that "government spending decisions pursuant to economic goals are not subject to preemption"; consequently, where the government agency is "acting as a purchaser in the marketplace, not as a regulator," the preemption doctrine simply is not applicable. *Phoenix Engineering, Inc.*, Nos. 91-5527, 91-658, Slip Op. at 23. Here, too, Bid Specification 13.1 only reflects Massachusetts' participation in the market, thereby avoiding any basis for federal preemption.

Moreover, even if the Commonwealth's limited involvement in implementing the Project Labor Agreement were deemed to be regulatory in nature, it is not unlawful regulation. Federal labor policy does not preclude state regulation of all labor-related matters; the thrust of *Machinists* preemption is to protect "conduct that Congress intended to be *unregu-*

*lated.*" *Golden State I*, 475 U.S. at 614 (emphasis added). In other words, where Congress has made a determination that management and labor should be left to their own devices, *i.e.*, "to the free play of economic forces," the states cannot impose regulation that interferes with those devices. Congress, however, never intended prehire agreements and union signatory clauses in the construction industry to be "unregulated." To the contrary, Section 8(e) and (f) on its face reflects a congressional intent to heavily regulate in this area, and this Court's decisions in *Woelke & Romero Framing* and *Jim McNeff* provide ample recognition of this intent.

The Sixth Circuit's decision in *Phoenix Engineering* reaffirms this conclusion as well. In rejecting a similar *Machinists* attack on the union signatory clause contained in that federal project labor agreement, the court found that Congress not only did not intend prehire agreements to be "unregulated," but that it extensively regulated these agreements "by limiting their use to the construction industry, by denoting which elements prehire agreements may contain, and by permitting representation elections during the term of the collective bargaining agreement." *Phoenix Engineering*, Nos. 91-5527, 91-658, Slip Op. at 35. This regulation, in the Sixth Circuit's opinion, clearly distinguished prehire agreements from the collective bargaining conditions found to be unlawfully imposed in the *Golden State* and *Machinist* cases. Because Congress did regulate, and permit, the use of prehire agreements in the construction industry, the Sixth Circuit determined that *Machinist* preemption did not—indeed could not—preclude a federal agency from authorizing and enforcing the project labor agreement negotiated by its construction manager. That same rationale is fully applicable here and any purported state "regulation" of prehire agreements that does not frustrate federal labor policy is not preempted.

### 3. *The Court Below Failed to Adequately Protect Explicit Federal Rights and Instead Granted to the States a Vehicle for Repealing Section 8(e) and (f)*

Necessarily, and directly, flowing from the lower court's ruling (although never explicitly addressed by the First Circuit) is the fact that a core provision in Kaiser's Project Labor Agreement has been rendered unenforceable. Because Kaiser, as a matter of state law, cannot contract directly with major project contractors, it also cannot directly implement its requirement that all other contractors become bound by the Project Labor Agreement. The only available means of implementation available under these state-required contracting limitations is the Commonwealth's Bid Specification. By invalidating the Specification, the court has precluded Kaiser from enforcing the Harbor Project Labor Agreement and effectively eliminated Kaiser's express right to enter into such an agreement under Section 8(e) and (f).

Since this result is reached in the name of preemption, the unavoidable question is, what federal rights are being protected by the lower court's action? The First Circuit answered this question by pointing to the "right" of project contractors to determine issues of union recognition and contract content for themselves. However, as discussed at length earlier, contractors and subcontractors in the construction industry have no such "right" under the NLRA. The very objective of Congress in enacting Section 8(e) and (f) was to clarify that a general contractor, such as Kaiser, is authorized to dictate union recognition and contract content for *all* site contractors. Thus, the First Circuit has actually permitted the repeal of a general contractor's explicit federal rights in favor of the "rights" of lower tier contractors that Congress intentionally abandoned more than three decades ago. Ironically, the First Circuit did this in the name of "preserving" the federal statutory scheme.

But even more troubling is that the First Circuit's decision gives individual states the opportunity to determine for themselves whether this repeal of Section 8(e) and (f) will occur within their jurisdictions. In the labor arena, one of the principal objectives of preemption is to ensure a uniform, federal labor law. *See Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 285-88 (1971); *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 490-91 (1953). Under the First Circuit's rationale, this objective is lost.

To quote dissenting Chief Judge Breyer, the First Circuit's holding creates the possibility of an "odd crazy-quilt of prehire practices." 935 F.2d at 364. Simply put, the preemption issue arose here because Massachusetts' bidding law required the state to contract directly with major project contractors (and prevented Kaiser from contracting with them) and required those contracts to be supported by bid specifications. In another jurisdiction, without required state involvement in the contracting process, there would be no preemption issue. Thus, depending upon the peculiar bidding law requirements imposed by various states and municipalities, what might be lawful in one location might well be unlawful, as "preempted," in another jurisdiction. Necessarily, then, whether Kaiser, and construction industry contractors like Kaiser, will have the opportunity to exercise Section 8(e) and (f) rights will not depend upon federal law, but rather will be determined by individual state or municipal laws. By enacting a bidding law or ordinance resembling the Massachusetts statute, any state or municipality could prevent contractors from effectively exercising Section 8(e) rights on public projects (or on some select public projects) within their jurisdiction. But it is precisely to avoid such an "odd crazy-quilt," in which issues of federal labor policy differ dramatically depending upon the peculiarities of a particular state's or municipality's laws, that the doctrine of federal labor preemption was created. *See Amalgamated Ass'n of Sheet*, 403 U.S. at 285-88; *Garner*, 346

U.S. at 490-91. Even the First Circuit observed that "congressional concern for a uniform, national labor policy as embodied in the NLRA" should not be subject to "secondary deference." 935 F.2d at 354.

The true irony, however, is that many of the Harbor (and Artery) Project's contractors likely will be confronted with a requirement that they comply with some union labor agreements even in the absence of the contested Bid Specification. Although Massachusetts' peculiar bidding laws require direct contracting between the Commonwealth and major contractors, those contractors in turn are permitted to contract directly with certain lower level subcontractors. To the extent any of those major contractors are union companies (as 75% or more are likely to be), and their individual, pre-existing labor agreements contain clauses that restrict subcontracting to employers who agree to become bound by those individual labor agreements (as virtually all do), the very "evil" the court below was determined to stop will nonetheless occur. Because it will be accomplished through a prehire agreement with a Section 8(e) union signatory clause, but without the support of a bid specification, this intrusion into the collective bargaining process of lower tier contractors will be immune from preemption attack. Thus, the uniformity demanded by federal labor policy will not even exist within the confines of this single Project, let alone across the nation.

## POINT II

## UNLESS REVERSED, THE FIRST CIRCUIT'S DECISION MUST RESULT IN THE PREEMPTION OF THE REMAINDER OF MASSACHUSETTS' PUBLIC BIDDING LAW

There is a significant impact of the First Circuit's decision that has been overlooked. If the decision below is affirmed,

then its preemption analysis must be taken one step further, resulting in the preemption of the remainder of Massachusetts' public bidding scheme.

There can be little question that if Massachusetts were to enact a law that explicitly prohibited construction industry employers from enforcing valid Section 8(e) and (f) agreements on public (or private) projects within the state, the law would be preempted because it would conflict with rights bestowed by federal law. The preemption doctrine, however, also prevents Massachusetts from enforcing a law that has that same effect, even if that is not its purpose. The First Circuit recognized as much in finding Bid Specification 13.1 preempted, noting that preemption analysis requires a court to look at the effect of a state law, regardless of its purpose, for to do otherwise would permit states a nearly unfettered right to nullify federal law. 935 F.2d at 354 (citing *Perez v. Campbell*, 402 U.S. 637 (1971)). What is significant, from a preemption perspective, is that the Massachusetts bidding law, as applied, conflicts with federal rights.

Prior to the First Circuit's decision, the fact that state law prevented Kaiser from contracting directly with lower tier contractors and required the state contracting authority to issue bid specifications as the means of implementing Kaiser's Project Labor Agreement posed no substantive interference with Kaiser's Section 8(e) and (f) rights. By following this state-mandated process, the necessary bid specification could be issued, making Kaiser's Project Labor Agreement fully enforceable. The impact of the First Circuit's ruling, however, is to prevent the issuance of this bid specification, while leaving intact the remainder of the Massachusetts bidding law that prevents Kaiser itself from implementing core portions of the Project Labor Agreement, *i.e.*, the requirement that all site contractors become bound by that Agreement. In the absence of Bid Specification 13.1, which is the piece that com-

pletes the enforcement circle, Kaiser's Section 8(e) and (f) rights are effectively eliminated.

This is exactly the result *Machinists* preemption was designed to avoid. This Court has described the "crucial inquiry regarding [*Machinists*] preemption" as whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Machinists*, 427 U.S. at 147-48. If the First Circuit's decision stands, then the remainder of Massachusetts' bidding law clearly "frustrates effective implementation" of Kaiser's Section 8(e) and (f) rights in that it prohibits Kaiser from enforcing its "union contracting" clause on the Harbor Project.

Within the framework established by the First Circuit, the only cure for this interference with Kaiser's explicit statutory rights is to recognize that the remainder of Massachusetts' bidding law is also preempted, thereby permitting Kaiser to enforce its Project Labor Agreement, in its entirety, even in the absence of its inclusion in any bid specification.

Of course, this necessary extension of the First Circuit's ruling, so that it also preempts the remainder of the bidding law, merely brings the Court to the same point it would be at if Bid Specification 13.1 were allowed to stand. The only difference is that the First Circuit's analysis requires invalidating a long-standing statutory public bidding scheme designed to protect the legitimate interests of the Commonwealth of Massachusetts. It is submitted that the proper application of the preemption doctrine allows this Court to preserve both Kaiser's rights and this legitimate state interest by recognizing the validity of Bid Specification 13.1.

## CONCLUSION

For these reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the First Circuit should be reversed.

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